BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

GARY LEE BRACKEN	)	
Claimant	)	
	)	
VS.	)	
	)	
U.S.D. 501	)	Docket No. 1,039,692
Self-Insured Respondent	)	
	)	

ORDER

Claimant requested review of the July 28, 2010 Order on Motion for Reconsideration[1] by Administrative Law Judge (ALJ) Rebecca Sanders. The Board heard oral argument on October 15, 2010.[2]

APPEARANCES

Frederick J. Patton, II, of Topeka, Kansas, appeared for the claimant. Larry G. Karns, of Topeka, Kansas, appeared for self-insured respondent (respondent).

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Post Award Medical Award.

ISSUES

The ALJ denied claimant's request to have the $2,120.41 in medical expenses from Dr. Michael McCoy paid by respondent as authorized medical expenses, as she

[1] The ALJ originally issued a post-Award Medical Order on July 13, 2010, but that Order was the focus of a Motion for Reconsideration, which then led to the Order which is the focus of this appeal.

[2] Due to the retirement of Carol Foreman, Stacy Parkinson, of Topeka, Kansas, was appointed to serve by the Acting Director Seth Valerius as a Board Member pro tem in this matter.

determined that K.S.A. 44-510j(h) was not applicable inasmuch as respondent had been providing treatment (through Dr. Bret Wallace) and claimant did not request a change of physician before incurring the bills now at issue. Thus, the bills incurred as a result of Dr. McCoy's evaluation in June and July 2009 were unauthorized. Claimant was not, therefore, entitled to payment of anything more than the $500 in authorized medical allowance afforded by the Act.

The claimant requests that the Board reverse the ALJ and authorize payment of the expenses incurred with Dr. McCoy. Claimant contends that respondent did, in fact, deny the sought-after treatment. And as a result, claimant was entitled to pursue the treatment he desired and under K.S.A. 44-510j(h), respondent is responsible for those costs as it is not undisputed that claimant's complaints were attributable to his work-related injury.

Respondent argues that the ALJ's Order should be affirmed. Respondent maintains it never refused to provide the medical treatment claimant sought. Rather, there was a difference of opinion over the *cause* of the need for knee surgery. But after Dr. McCoy's July 2009 examination, Dr. Wallace (the originally authorized treating physician) agreed to perform surgery recommended by Dr. McCoy. Thus, the bills claimant incurred were nothing more than claimant's attempt to secure a second opinion regarding his need for further treatment. And those bills are subject to the statutory limit of $500 for unauthorized treatment.[3]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

In December 2008, claimant settled his claim for a left knee injury but retained the ability to seek additional medical upon proper application with the Division. In early 2009, claimant continued to have problems with his left knee and went to his treating physician, Dr. Wallace, for assistance. Dr. Wallace was unable to identify any particular problem and apparently offered claimant nothing further. According to respondent, Dr. Wallace determined that claimant's complaints were not due to the work-related injury.

On April 13, 2009, claimant filed an E-4, an Application for Post-Award Medical. **It does not appear that any supporting medical documentation was submitted with this E-4**. No action was immediately taken on this request.

[3] K.S.A. 44-510h(b)(2).

Then, on April 14, 2009, claimant sought a second opinion with Dr. McCoy. Dr. McCoy ordered an MRI to be done along with plain x-rays. All totaled, claimant incurred $2,120.41 for Dr. McCoy's services and that of the supportive medical providers.

At the conclusion of Dr. McCoy's evaluation, respondent was again requested to provide additional medical treatment, this time in the form of surgery as outlined by Dr. McCoy. Dr. Wallace indicated his willingness to perform this surgery, but for whatever reason, the relationship between claimant and Dr. Wallace deteriorated and the surgery was not performed.

On April 20, 2010, claimant filed a request for a Change of Physician and that same day, filed a second E-4, requesting additional treatment. Respondent redirected claimant's care to Dr. McCoy and things have proceeded uneventfully, except for the issue of the bills incurred in June and July 2009, relative to Dr. McCoy's evaluation.

The ALJ denied claimant's request that Dr. McCoy's bills be categorized as authorized under K.S.A. 44-510j. That statute provides the following:

> (h). . . If the employer has knowledge of the injury and refuses or neglects to reasonably provide the services of a health care provider required by this act, the employee may provide the same for such employee, and the employer shall be liable for such expenses subject to the regulations adopted by the director.

The ALJ, in her original Order on this issue, reasoned that -

> First, [r]espondent was providing medical care from Dr. Wallace. If [c]laimant was dissatisfied with medical care he received from Dr. Wallace he could have requested a change of physician. Claimant did not do so. The record is devoid of any request by the [c]laimant for change of physician before he sought the medical treatment from Dr. McCoy. After [r]espondent became award of the disintegration of the relationship between Dr. Wallace and the [c]laimant, they authorized Dr. McCoy. The Court finds that an award of medical expenses as authorized under **K.S.A. 44-510j** is not applicable.[4] (emphasis supplied)

Claimant maintains the ALJ's analysis is misplaced. Respondent was not, in claimant's view, providing treatment at all. While Dr. Wallace was authorized to treat claimant's knee complaints, Dr. McCoy was not. Instead, respondent persisted in maintaining that claimant's complaints were attributable to another non-work related condition or cause. Only after Dr. McCoy disabused respondent of that belief was treatment again authorized.

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[4] ALJ Post-Award Medical Award (Jul. 13, 2010) at 4; ALJ Order on Motion for Reconsideration (Jul. 28, 2010) at 1.

Respondent, on the other hand, believes the ALJ was entirely accurate in her analysis and should be affirmed. Respondent steadfastly maintains that claimant pursued unauthorized medical treatment, in excess of $2,000, and now wants respondent to pay that cost. The mere fact that Dr. McCoy was ultimately designated the treating physician is irrelevant to the issue now on appeal. Likewise, the fact that Dr. Wallace was initially unwilling to perform additional treatment is also irrelevant because he was still authorized by respondent to provide treatment as necessary for the work-related injury.

The Board has considered the parties' arguments and concludes that the ALJ's Order should be affirmed. Based upon this record it cannot be said that respondent was refusing to provide treatment. Dr. Wallace was apparently always available to claimant, claimant merely was not getting the treatment he desired. In effect, claimant has had to go to the expense of proving respondent's position to be *wrong*, but that is claimant's burden in a post-award matter.[5] But the Act provides for an unauthorized medical allowance and a post-award preliminary hearing process for situations just such as this.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Order on Motion for Reconsideration of Administrative Law Judge Rebecca Sanders dated July 28, 2010, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of October 2010.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

[5] K.S.A. 44-501(a); *Wiyninger v. U.S.D. 259*, No. 222,541, 2003 WL 359850 (Kan. WCAB Jan. 14, 2003); see also *Higgins v. Abilene Machine, Inc.*, 288 Kan. 359, 204 P.3d 1156 (2009)..

c: Frederick Patton, II, Attorney for Claimant
Larry G. Karns, Attorney for Self-Insured Respondent
Rebecca Sanders, Administrative Law Judge
Stacy Parkinson, Pro Tem Board Member